Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973
No. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

Petitioner,

-vs-

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and

THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Respondents.

BRIEF OF *AMICUS CURIAE* (STATE OF FLORIDA) IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN AND FOR THE FIFTH CIRCUIT

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PRELIMINARY STATEMENT

Comes now the State of Florida, by and through its Attorney General, and files its brief *Amicus Curiae* in the above-styled cause on behalf of Petitioner.

Amicus adopts *in toto* the position taken by Petitioner in the brief heretofore filed in this Court, and in addition thereto submits the cause should be reversed for the reasons stated hereinafter.

QUESTION PRESENTED

THE UNITED STATES COURT OF APPEALS ERRED IN HOLDING THAT ARRESTEES HELD FOR TRIAL UPON INFORMATIONS FILED BY THE STATE ATTORNEY MUST BE AFFORDED PRELIMINARY HEARINGS BEFORE A JUDICIAL OFFICER WITHOUT UNNECESSARY DELAY NOTWITHSTANDING RULE 3.131(a), FLORIDA RULES OF CRIMINAL PROCEDURE.

ARGUMENT

The United States Court of Appeals, as well as the District Court, held that the Fourth and Fourteenth Amendments affirmatively require that arrestees held for trial upon informations filed by the state attorney must be afforded preliminary hearings before a judicial officer without unnecessary delay, in effect declaring Rule 3.131(a), Florida Rules of Criminal Procedure, unconstitutional, for said Rule dispenses with preliminary hearings to a defendant charged by an information or indictment.[1]

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[1]Subsection (b) of said Rule was wholly misconstrued by the Court of Appeals for that section only pertains to persons who have not been indicted or informed, but who have been arrested on a warrant or in some cases without one. It does not mean persons charged by indictment or information are entitled to a preliminary examination within 72 hours.

The lower courts both recognized the nonnecessity of a preliminary examination wherein an indictment is returned against the accused, which is not surprising in light of this Court's Rule 5, Federal Rules of Criminal Procedure. Subsection (c) provides:

> "(c) Offenses Not Triable by the United States Magistrate.
>
> * * *
>
> "A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court

before the date set for the preliminary examination.
* * *." [Emphasis Supplied]

The lower court's conclusion that a preliminary examination could not be dispensed with where the defendant is held pursuant to a charge contained in an information, but such could be done where the accused is charged by an indictment was in no way explained by either tribunal. If one procedural method offends due process and the other does not, then it would necessarily follow that there is a substantial difference in the two methods. The State of Florida suggests the differences that may exist are more illusionary than real. It is the same state attorney who draws a direct information, based upon testimony presented to him under oath, who brings the evidence to the grand jury, advises them as to the various laws that might be involved and in most cases makes a recommendation as to whether they should indict or not. Indeed, there are many individuals who suggest that the grand jury has out lived its usefulness because of the power exerted over them by the over-zealous prosecutor. Of course, grand jurors are lay persons selected from the community at large and under no circumstance can they be considered a "judicial magistrate." If one is intellectually honest about the matter, he must admit that while there may be a distinction between the two methods in law, there is virtually no difference in fact or in substance. Needless to say, if one is truly concerned with substance, different principles cannot be applied in

cases where a person is charged by an indictment on one hand and by an information on the other.

It is specifically because of the fact that there is no difference that the Florida Supreme Court saw fit to adopt 3.131(a), Florida Rules of Criminal Procedure, dispensing with preliminary hearings if the defendant is charged in an information or indictment and is perhaps why this Court did the same in Rule 5, Federal Rules of Criminal Procedure.

The Court of Appeals' reliance upon *Coolidge v. New Hampshire*, 403 U.S. 443 (1970) and *Morrissey v. Brewer*, 408 U.S. 471 (1971) is clearly misplaced. *Coolidge v. New Hampshire* dealt with the issuance of a warrant to justify the seizure of property, and this Court held a warrant had to be issued by a neutral magistrate under the Fourth Amendment of the United States Constitution. *Coolidge* did not hold that subsequent to the seizure there had to be a judicial examination to determine whether there was a basis to continue to hold the evidence. The *Coolidge* case is simply not applicable for if it were, the plaintiffs would have been asserting that they could not be arrested without a warrant issued by a judicial officer, a proposition this Court rejected in *Trupiano v. United States*, 334 U.S. 699 (1948), or that they had to have a preliminary examination prior to the filing of an information, a proposition this Court repudiated in *Hurtado v. California*, 110 U.S. 516 (1884).

In *Morrissey v. Brewer*, supra, this Court held a parolee was entitled to a prompt hearing to determine probable cause before someone not directly involved with the alleged violator. This Court did not require that it be before a judicial officer, just someone not directly involved with the parolee. That is precisely what the state attorney is! In this respect, Rule 3.131(a) is consistent with the rationale of *Morrissey*, not antagonistic to it. Moreover, and perhaps more importantly is the uniqueness of the institution of parole itself. In *Morrissey*, the Court observed that the revocation hearings were often times held in places far removed from the place where the violation occurred and without compulsory process the parolee could not adequately present a defense to the charge. It was this very fact which caused this Court to hold that due process required there be a "minimal inquiry near the place of the alleged parole violation." No such problem exists in a criminal case, for the defendant must be tried in the county wherein the crime is committed and a defendant in a criminal trial clearly has the right to compulsory process of witnesses. Accordingly, a *Morrissey* hearing in the context of a criminal trial serves no valid purpose and certainly the absence of such a hearing does not violate the Due Process contemplated in *Morrissey*.

The State of Florida urges that the dispensation of preliminary examinations wherein an information is filed should be approved by this Court for the same reasons that it is dispensed with when a person is charged by an indictment, and that due process is not offended thereby.

Examination of the Florida Rules of Criminal Procedure, specifically Rules 3.130, 3.191, and 3.220 will reveal that in light of those procedural safeguards due process is not violated by the failure to provide for preliminary hearings where the accused is charged by an information or indictment.

In *Coleman v. Alabama*, 399 U.S. 1 (1970), this Court held due process required the appointment of counsel to represent an indigent at a preliminary hearing because in Alabama it was a critical stage of the criminal proceeding. This Court, of course, did not hold the state had to hold such hearings,[2] but merely that where one was held counsel had to be provided. The Court in concluding such hearings were "critical stages" of the proceedings noted the advantages to be gained by the defendant saying:

> "'First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over.

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[2]Interestingly, Mr. Justice White's special concurring opinion assumed such hearings could be dispensed with for he opined, "Our ruling may also invite eliminating the preliminary hearing system entirely" 399 U.S. at 18. Obviously, if the constitution required them they could not be eliminated.

> Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the t .al. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.'"
> 399 U.S. at 9

Under Florida law the interests or rights referred to above are readily available to the defendant without a preliminary hearing ever being held.

Florida law clearly authorizes the prosecuting officer to file an information against the accused even if no probable cause has been found. *State v. Hernandez*, 217 So.2d 109 (Fla. 1968). Florida's discovery rules, to-wit: Rule 3.220, are the most comprehensive rules of discovery in the United States, and under those rules he has a right to take the deposition of all of the witnesses the state intends to use at trial. Rule 3.220(d) These

depositions may be taken "at any time after the filing of the indictment or information." This discovery together with evidence the state attorney must disclose to the defendant and his counsel for inspection and copying under Rule 3.220(a) and (b) provides the defendant with ample "impeachment tools for use in cross-examination of the State's witnesses at the trial", and insures that he will be able to prepare a "proper defense." Indeed, when one considers that a preliminary hearing can be conducted without all of the State's witnesses and may rest solely on hearsay evidence "in whole or in part", Rule 5.1, Federal Rules of Criminal Procedure, use of the discovery rules is better designed to provide the defendant with the information this Court indicated he might obtain at a preliminary hearing.

Insofar as acting as a conduit to bail or psyciatric examinations, the preliminary hearing is totally unnecessary in this State. Rule 3.130, Florida Rules of Criminal Procedure requires a first appearance within 24 hours of arrest, 3.130 (b)(1), and it is at this hearing that the trial judge is to determine whether bail is even necessary to assure the defendant's appearance for he may release him on his own recognizance and, of course, the defendant is "entitled as of right to be admitted to bail before conviction", 3.130(b)(4), unless the offense charged is a capital offense or an offense punishable by life imprisonment, in which case the proof of guilt must be evident or the presumption great. Since bail is determined prior to the time that any

meaningful preliminary hearing could be held,[3] such a hearing could have no relevancy or bearing upon bail. Rule 3.210 provides for an inquiry into the defendant's sanity on motion at any time before or during trial and the preliminary hearing is not needed for this purpose.

Florida's mandatory speedy trial rule, Rule 3.191, compliments the rights referred to above, and it is respectfully suggested that in this State no substantial right is denied to an individual accused with the commission of a crime because he is not afforded a preliminary examination where he has been charged by an indictment or information. The district court erred in concluding due process required

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[3] The Respondents object to the alleged timeliness of the preliminary hearing and the district court was concerned about the fact that a "...deprivation of liberty for four days, absent a judicial determination of probable cause, is questionable..." (App. 111) This is indeed strange, for this Court's Rules provide the magistrate shall schedule a preliminary examination within a "reasonable time . . . not later than 10 days following the initial appearance if the defendant is in custody..." Rule 5(c)! The Court's conclusion that "...an eight day (24 hours for initial appearance plus seven days) deprivation of liberty is not reasonable..." (App. 111) is clearly erroneous under Rule 5(c).

such hearings and the Court of Appeals, Fifth Circuit, erred in affirming such conclusion.

Florida's recently amended Rules of Criminal Procedure which were designed to "...secure the just, speedy and efficient disposition of criminal cases..." Rule 3.025(a) represents an experiment by one state to devise a criminal justice system that will work better than the system that everyone admits is fraught with delay, surprise and injustice. Isolated portions, without regard to the whole were, in effect, declared unconstitutional before they were even implemented and put into use. What makes this so incomprehensible was that the rule faulted was modeled to a great extent after this Court's rules pertaining to first appearances, the difference being that preliminary hearings are dispensed with where the defendant is charged by an indictment or an information under Florida's Rules. As has been urged above, the two methods of charging are so similar, in fact, that this modification of the rule in no way alters its substantive worth.

The United States Court of Appeals, Fifth Circuit, erred in concluding under Florida prosecutorial rules an individual charged with a crime by an information must be accorded a preliminary examination, and the failure to do so violates due process of law. This Court should reverse said holding.

Whether the decision of the Fifth Circuit Court of Appeals can invest a lesser tribunal (magistrate-county judge) with jurisdiction sufficient to disturb the custody of a defendant held in jail as a result of having been charged by information with a crime in Florida is what this Court must decide.

The Supreme Court of Florida is the final and unreviewable interpreter of Florida law and, with respect to matters of state law, the decisions of that court binds everyone. *Scripto, Inc. v. Carson*, 362 U.S. 207, 4 L.ed.2d 660, 80 S.Ct. 619; *Murdock v. Memphis*, 20 Wall. 590 (1875); *Berea College v. Kentucky*, 211 U.S. 45, 53; *Fox Film Corp. v. Muller*, 296 U.S. 207. As recently as 1964, this very Court in pursuance of Rule 4.61, Florida Appellate Rules, 31 F.S.A., requested of the Florida Supreme Court a decision by that tribunal regarding the jurisdiction of the several courts involved in that case so that it could, in turn, determine whether matters pending before it should be disposed of in one as opposed to another fashion. *Dresner v. Tallahassee*, 375 U.S. 136, 11 L.ed.2d 208, 84 S.Ct. 235. After having received the opinion of the Florida Supreme Court, the matters involved as to

Dresner were dismissed by this Court in the following language:

> "PER CURIAM.
> The questions which this Court certified to the Supreme Court of Florida, 375 U.S. 136, 11 L.Ed.2d 208, 84 S.Ct. 235, having been answered in the affirmative, 164 So.2d 208, the writ of certiorari is dismissed as improvidently granted. 28 USC § 1257." 378 U.S. 539, 12 L.ed.2d 1018, 84 S.Ct. 1895.

Again, this Court in *Callendar v. Florida*, 380 U.S. 519, 85 S.Ct. 1325, 14 L.ed.2d 265 (1965), and *Callendar v. Florida*, 383 U.S. 270, 15 L.ed.2d 749, 86 S.Ct. 924 (1966), recognized that it was bound by the Florida Supreme Court's determination regarding the jurisdiction of courts in Florida.

It follows that this Court has repeatedly recognized the exclusive authority of the Florida Supreme Court to determine the jurisdiction of the several courts of the State of Florida. See *Dresner v. Tallahassee*, supra, and *Callendar v. State*, supra.

By operation of law (Article V, Section 2, Constitution of the State of Florida, see addendum at page 1307 through 1312 of Volume 3, Florida Statutes, 1971), the Florida Supreme Court is vested with the exclusive authority to promulgate rules and regulations regarding both jurisdiction and practice in the several courts of the state. It has adopted what is known as Florida Rules of Criminal Procedure, effective February 1, 1973, wherein the procedure to be followed with regard to arrestees is set out therein and in particular in Rules 3.120, 3.130 and 3.131.

That same Article V, Section 5, sets forth the jurisdiction of the circuit courts of the State of Florida, and Section 6 thereof sets forth the jurisdiction of the county courts. It may be easily noted that the circuit courts have jurisdiction of all matters not vested in the county courts.

When an individual is indicted or informed against in the State of Florida, those formal charges are routinely filed with the clerk of the circuit court where the charge is brought, thereby vesting the circuit court with jurisdiction of the accused and the subject matter until such time as the issues have been disposed of. Obviously the circuit court has jurisdiction to dispose of all matters relating to that formal charge and in so doing is reviewable on appeal

as a matter of right to the appropriate district court of appeal or to the Florida Supreme Court as the case may be.

The criminal jurisdiction of the county court is limited to misdemeanors. Accordingly, they are, in the judicial structure of the State of Florida, a lesser tribunal--in short they are Florida's magistrates much as the former United States Commissioners are now federal magistrates. In that posture their jurisdiction no more permits them to invade the province of the circuit court regarding the custody of an accused against whom an information has been filed than could a federal magistrate invade the province of a Federal District Court once an accused has been informed against. Only the circuit court or a district court of appeal or the Florida Supreme Court, or conceivably this Court, has authority to alter the custody of an individual so confined.

By ruling as it did in the decision below, the Court of Appeals purported to vest the several magistrates (county judges) in Florida with jurisdiction to review an accused's custody ostensibly on the theory of a preliminary hearing. The net effect of this is to permit (by dint of an impossible judicial fiat) Florida's lowest court to override the authority of a Florida circuit court, even to the point of ordering the release of an accused theretofore con-

trolled only by the circuit court or by the other courts above it mentioned previously. The Florida Supreme Court has never vested magistrates with that kind of authority--they do not now have it--and they cannot be given it, however desirable that conclusion may appear to the Court of Appeal below.

The upshot of the action taken by the Court of Appeals in this matter, is that an allegedly impartial magistrate is the *key* which insures that due process attends the proceedings they reviewed.

Apparently no one involved in this litigation quarrels with the proposition that a given state attorney in Florida is free to file informations by virtue of the authority vested in him to so do under Florida law. It also seems apparent that nobody quarrels with the proposition that at preliminary hearings for those arrested on a warrant (no indictment or information having been filed) a magistrate in Florida is free within the bounds of propriety to either find probable cause and bind one over for trial, or find its absence and order his release. Accordingly, some questions must arise as to whether this magistrate's preliminary hearing is, in fact, any *key*

at all.

Ostensibly, the only difference between the matter set out immediately above and the following, is that an information has been filed and the individual has been arrested on a *capias* based thereon. In either instance, no particular arguments would arise in those cases in which the magistrate found probable cause and entered an order binding the accused over for trial in the circuit court. We ask, "Suppose he finds an absence of probable cause and orders the individual released from custody under the charge?" Not in either instance would such an order prohibit the state attorney from thereafter filing his information, securing a *capias*, and having the accused arrested thereon and confined as a result thereof. By like token in the initial illustration of an individual arrested on a warrant without an information or an indictment having been filed against him, a finding of probable cause by the magistrate accompanied by an order binding him over for trial, does not require the state attorney to bring any charges against the individual either by indictment or information--that being the province of the state attorney's good judgment alone.

So it is that four possibilities exist in the relationship of the office of the state attorney and that of Florida's county judge-magistrate:

1. Finding of probable cause by a magistrate against an individual routinely arrested but neither indicted nor informed against.

2. A finding of a lack of probable cause by a magistrate against an individual routinely arrested but neither indicted nor informed against.

3. A finding of probable cause against an individual arrested based upon an information.

4. A finding of an absence of probable cause for an individual arrested based upon an information.

Of these, certainly the situations involved in numbers 1, 2, and 4 have absolutely no effect upon the subsequent action taken by the state attorney with regard to the individual involved.

It is at best doubtful that even the situation set out in number 3 has any effect upon the state attorney in terms of a requirement that he continue to prosecute the arrestee against whom the magistrate has found probable cause. This is so for the reason that the state attorney is free to file in court his order *nolle prosequi* at any time before the verdict

is returned by the jury. In this he cannot be challenged.

Since it is obvious that in virtually all four of the only possible instances that could arise the magistrate has absolutely no control over the disposition of the accused in terms of the criminal charge, one must wonder at just what, if anything, the opinion of the Court of Appeals below was meant to accomplish. Certainly it cannot be said that the illegal detention of an accused was its grail. *Amicus* has demonstrated beyond question that such disposition simply cannot be made by <u>anyone</u> who sits in the capacity of a magistrate--certainly never a county judge in the state of Florida--quite likely no other judge or justice at any time prior to trial unless on a petition for writ of habeas corpus urging a total absence of any evidence.

If the magistrate and the preliminary hearing are to be the *key* which we submit can be the only intention of the decision of the Court of Appeals, then such a *key* must both lock and unlock the door to an arrestee's custody regardless of what prompted the arrest. Since it could not be the *key* before the decision of the Court of Appeals and cannot be as a result of it, it should be characterized as just what it is (in light of this Court's own decisions in matters virtually identical to this situation in all particulars and this

Court's own rules of procedure dealing with identical matters)--a judicial futility.

CONCLUSION

For these reasons, *Amicus* respectfully urges this Court to reverse the holding of the Court of Appeals in and for the Fifth Circuit in this cause.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, GEORGE R. GEORGIEFF, Counsel for *Amicus Curiea*, and a member of the Bar of the United States, hereby certify that on the _____ day of January, 1974, I served copies of the Brief of *Amicus Curiae* on Bruce Rogow, Esquire, 733 City National Bank Building, Miami, Florida, and Phillip A. Hubbart, Esquire, Counsel for Respondents; and Peter L. Nimkoff, Esquire, Suite 607, Ainsley Building, 14 N.E. First Avenue, Miami, Florida, and Lewis Jepeway, Jr., Esquire, 101 E. Flagler Street, Miami, Florida, by a duly addressed envelope with postage prepaid.

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